A

Direct Express (M) Sdn Bhd v Affin Bank Bhd

B HIGH COURT (GEORGETOWN) — CIVIL APPEAL NO 12A-NCVC-8–07 OF 2015
LIM CHONG FONG JC
3 FEBRUARY 2016

C *Civil Procedure — Striking out — Appeal — Banking — Banker-customer relationship under loan contract — Bank failed to act in accordance with mandate and instruction of customer — Bank filed to strike out application — Whether action was plain and obvious case to strike out — Whether action summary in nature — Whether there were triable issues — Rules of Court 2012 O 18 r 19*

D

For purposes of building a warehouse with office facilities, the appellant appointed Fairon Construction Engineering Sdn Bhd ('Fairon') as the building contractor. The appellant applied for a loan facility from the respondent to finance the project. By a letter of offer dated 3 April 2012 ('letter of offer'), the E respondent offered to the appellant a loan facility for a total amount of RM15m comprising two term loan facilities of RM3.4m ('term loan 1') and RM11.6m ('term loan 2'). The object of the term loan 1 was to settle the existing loan facility granted by UOB Bank Bhd to the former lessor of the land and to redeem UOB Bank Bhd's charge on the land whereas term loan 2 was to F finance 80% of the construction expenditure of the project. The appellant accepted the offer and since the commencement of the construction of the project, the appellant wrote progressively to the respondent to disburse the term loan 2 pursuant to the facility agreement. Upon completion of the project and in respect of progress payment certificate No 8, Fairon consented to the G remittance of RM901,216.38 to be made to Direct Express Logistics (M) Sdn Bhd, a subsidiary of the appellant for payment of materials and labour supplied to Fairon as well as for retention money pursuant to the building contract. The respondent failed to comply with the instruction of the appellant. In a meeting held between the appellant and the respondent, it was agreed that the H respondent would disburse RM932,175.63 and RM901,216.38 to Fairon and Direct Express Logistics (M) Sdn Bhd respectively in respect of progress payment certificate No 8. The respondent replied on 4 June 2014 confirming their refusal to comply with the appellant's instruction by reason of Fairon's withdrawal of its earlier consent for payment to Direct Express Logistics (M) I Sdn Bhd and that Direct Express Logistics (M) Sdn Bhd wasn't a party to the building contract or facility agreement. The respondent hence disbursed the entire amount of RM1,833,392.01 pursuant to progress payment certificate No 8 to Fairon notwithstanding the appellant's forbidding the respondent to do so. The appellant disagreed with the respondent's stance and was of the idea

that the respondent acted in breach of the appellant's instruction. Accordingly, the appellant filed an action in the sessions court, contending principally that it was entitled to bring the suit against the respondent for failure to act in accordance with mandate and instruction of the appellant in breach of banker-customer relationship under a loan contract. The respondent filed a striking out application pursuant to O 18 r 19 of the Rules of Court 2012. The sessions court allowed the respondent's application. Hence, the present appeal.

Held, allowing the appeal:

(1) Section 5.01 of the facility agreement and cl 2.8 (c) of the letter of offer read together showed that there was no stipulated and prefixed person wherein the respondent must disburse the payment pursuant to term loan 2. The predominant purpose of the independent architect's certificate was arguably for ascertaining the proper valuation of the work done rather than the designated person to be paid as seemingly contended by the respondent (see para 26).

(2) It was the appellant that mandated and instructed the respondent to disburse the loan for each and every progress payment since the commencement of the construction works of the project. In this respect, the payee was Fairon for progress payment certificates Nos 1 to 7 as so directed. This was the established course of dealing between the parties and the respondent must be estopped from contending that there was neither the right nor the ability of the appellant to dictate the payee to the respondent (see para 27).

(3) This was not a plain and obvious case to strike out the sessions court suit. The principles in an application for summary judgment apply to a striking out application too since they are both summary in nature. There are triable issues herein as to whether the appellant was mandated pursuant to the facility agreement and letter of offer to dictate the payee to the respondent and associated with that; whether the respondent was estopped from refusing to comply with the appellant's instructions to pay Direct Express Logistics (M) Sdn Bhd as the payee based on their past course of dealings. Moreover, the circumstances and hence the justification for the unilateral withdrawal of Fairon's consent needed investigation by way of trial. It was fatal to an application that was summary in nature when the crucial evidence of the unilateral withdrawal was not even adduced before the court (see para 29).

[Bahasa Malaysia summary

Bagi tujuan membina sebuah gudang dengan kemudahan pejabat, perayu telah melantik Fairon Construction Engineering Sdn Bhd ('Fairon') sebagai kontraktor bangunan. Perayu memohon kemudahan pinjaman daripada responden untuk membiayai projek tersebut. Melalui satu surat tawaran

bertarikh 3 April 2012 ('surat tawaran'), responden menawarkan kepada perayu satu kemudahan pinjaman berjumlah RM15 juta yang terdiri daripada dua kemudahan pinjaman bersyarat iaitu RM3.4m ('pinjaman bersyarat 1') dan RM11.6m ('pinjaman bersyarat 2'). Tujuan pinjaman bersyarat 1 adalah untuk menyelesaikan kemudahan pinjaman sedia ada yang diberikan oleh UOB Bank Bhd kepada pemajak tanah terdahulu dan menggadaikan pajakan UOB Bank Bhd atas tanah manakala pinjaman bersyarat 2 adalah untuk membiayai 80% perbelanjaan pembangunan projek. Perayu menerima tawaran dan sejak pemulaan pembangunan projek, perayu menulis kepada responden secara berperingkat-peringkat untuk membayar semula pinjaman bersyarat 2 untuk perjanjian kemudahan. Setelah projek selesai dan bagi sijil bayaran progresif No 8, Fairon membenarkan pengiriman RM901,216.37 dibuat kepada Direct Express Logistics (M) Sdn Bhd, anak syarikat perayu bagi bayaran material dan buruh yang dibekalkan kepada Fairon dan juga wang tahanan di bawah kontrak bangunan. Responden gagal mematuhi arahan perayu. Dalam perjumpaan yang diadakan antara perayu dan responden, dipersetujui bahawa responden akan membayar semula RM932,175.63 dan RM901,216.38 masing-masing kepada Fairon dan Direct Express Logistics (M) Sdn Bhd, bagi sijil bayaran progrsif No 8. Responden membalas pada 4 Jun 2014, mengesahkan keengganan mereka mematuhi arahan perayu oleh sebab penarikan kebenaran Fairon bagi bayaran kepada Direct Express Logistics (M) Sdn Bhd dan bahawa Direct Express Logistics (M) Sdn Bhd bukan pihak kepada kontrak bangunan atau perjanjian kemudahan. Responden seterusnya membayar semula keseluruhan jumlah RM1,833,392.01 di bawah sijil bayaran progresif No 8 kepada Fairon tanpa mengira larangan perayu. Perayu tidak bersetuju dengan pendirian responden dan berpendapat bahawa responden melanggar arahan perayu. Oleh itu, perayu memfailkan tindakan ini di mahkamah sesyen dan menghujahkan bahawa ia berhak memulakan guaman terhadap responden kerana kegagalan bertindak selaras dengan mandat dan arahan perayu, satu pelanggaran hubungan bank-pelanggan di bawah kontrak pinjaman. Responden memfailkan permohonan pembatalan di bawah A 18 k 19 Kaedah-kaedah Mahkamah 2012. Mahkamah sesyen membenarkan permohonan responden. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Seksyen 5.01 perjanjian kemudahan dan klausa 2.8(c) surat tawaran dibaca bersama-sama menunjukkan bahawa tiada orang yang ditetapkan atau dinyatakan untuk responden bayar di bawah pinjaman bersyarat 2. Tujuan utama sijil arkitek bebas tidak dinafikan, adalah untuk mengenal pasti penilaian betul kerja yang dilakukan dan bukan orang yang patut dibayar seperti yang dinyatakan oleh responden (lihat perenggan 26).

(2) Perayu yang memandatkan dan mengarahkan responden untuk membayar semula pinjaman bagi setiap bayaran progres sejak pemulaan

kerja-kerja pembaikan projek. Berkenaan hal ini, pembayar adalah Fairon bagi sijil bayaran progresif No 1 hingga 7 seperti yang diarahkan. Ini adalah langkah urusan yang telah ditetapkan antara pihak-pihak dan responden mesti diestop daripada menghujahkan bahawa perayu tidak berhak atau tidak boleh mengarahkan pembayar kepada responden (lihat perenggan 27).

(3) Ini bukan kes yang mudah dan jelas untuk mahkamah sesyen batalkan. Prinsip dalam permohonan penghakiman ringkas terpakai pada permohonan pembatalan juga kerana keduanya bersifat ringkas. Terdapat isu-isu dalam kes ini tentang sama ada perayu dimandatkan di bawah perjanjian kemudahan dan surat tawaran mengarah responden sebagai pembayar dan mengaitkannya; sama ada responden diestop daripada enggan untuk mematuhi arahan perayu untuk membayar Direct Express Logistics (M) Sdn Bhd sebagai pembayar berdasarkan langkah urusan terdahulu. Tambahan lagi, hal keadaan dan justifikasi bagi penarikan kebenaran Fairon memerlukan siasatan melalui perbicaraan. Adalah menjejaskan permohonan yang bersifat ringkas apabila keterangan penting penarikan satu hala tidak dikemukakan di mahkamah (lihat perenggan 29).]

Notes

For cases on striking out in general, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 8706–9062.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1; [2006] 3 AMR 629, FC (refd)

Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd [2006] 4 MLJ 271; [2006] 2 CLJ 1021, CA (refd)

Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim [2013] 4 MLJ 173, CA (refd)

Public Bank Bhd & Anor v Exporaya Sdn Bhd [2013] 1 MLJ 507; [2013] 1 AMR 191, CA (refd)

Ricky Thong Yew Fook & Anor v Arab Malaysian Bank Bhd [2011] 4 MLJ 268; [2011] 1 AMR 325, FC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19, O 55 r 2

Simon Murali (Lio & Partners) for the appelant.

Sim Liang Shen (Ong Bee Khoon with her) (Gibb & Co) for the respondent.

Lim Chong Fong JC:

INTRODUCTION

[1] This is an appeal brought by the appellant/plaintiff against the decision of the sessions court dated 1 July 2015 allowing the respondent/defendant's application to strike out the appellant's writ and statement of claim.

[2] The appellant sought and obtained loan financing from the respondent bank to build a warehouse with office facilities on nine plots of land in Kulim, Kedah ('land') leased by the appellant.

[3] The sessions court suit brought by the appellant against the respondent is for breach of contract by reason of the respondent's failure, refusal or neglect to disburse the loan in accordance with the mandate and directive of the plaintiff.

[4] The respondent in response on 29 October 2014 filed a striking out application pursuant to O 18 r 19 of the Rules of Court 2012.

The affidavits filed for purposes of the application are as follows:

(a) the respondent's affidavit in support affirmed by Yasotha KR Gopal dated 28 October 2014;

(b) the appellant's affidavit in reply affirmed by Karupaiya a/l Mutusami affirmed dated 19 November 2014; and

(c) the respondent's affidavit in reply affirmed by Yasotha KR Gopal dated 4 December 2014.

[5] The learned sessions court judge allowed the respondent's application; hence this appeal. Pursuant to O 55 r 2, I heard the appeal on 12 January 2016 by way of rehearing by considering the case afresh without reference to the reasons and written grounds of the session court which is nonetheless unavailable herein.

[6] After having read the appeal record and hearing counsel, I allowed the appeal with costs of RM5,000. I further set aside the decision of the learned sessions court judge and ordered that the suit be tried before another sessions court judge.

[7] The respondent is dissatisfied with my decision and has filed an appeal to the court of appeal on 27 January 2016. Accordingly, I provide herein below the grounds of my decision.

SALIENT BACKGROUND FACTS

[8] For purposes of building a warehouse with office facilities on the land ('project'), the appellant appointed a Fairon Construction Engineering Sdn Bhd ('Fairon') as the building contractor. The building contract is evidenced by a letter dated 24 February 2012 issued by the appellant to Fairon.

[9] In addition, the appellant applied for a loan facility from the respondent to finance the project. By a letter of offer dated 3 April 2012 ('letter of offer') the respondent offered to the appellant a loan facility for a total amount of RM15m comprising of two term loan facilities of RM3.4m ('term loan 1') and RM11.6m ('term loan 2'). The object of the term loan 1 is to settle the existing loan facility granted by UOB Bank Bhd to the former lessor of the land and to redeem UOB Bank Bhd's charge on the land whereas term loan 2 is to finance 80% of the construction expenditure of the project. The appellant accepted the offer on 6 April 2012.

The terms of the letter of offer include the following:

> 2.6 Drawdown
>
> (a) Borrower's 20% portion for the first and subsequent progressive claim up to RM 1.0M to be taken from Borrower's contribution kept with the Bank; thereafter, 20% on each progress claims value to be settled by the Borrower before the progressive drawdown subject to confirmation by the Bank's attending solicitor and against independent Architect's certification of work done in accordance to the progress of the construction.
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> (b) ...
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> (c) The Term Loan 2 is to be released progressively against Independent Architect Certificate upon site visit by the bank's Relationship Manager/Officer to verify the stage of completion.

[10] Subsequently on 3 September 2012, the respondent and the appellant entered into a facility agreement ('facility agreement'). The terms of the facility agreement include the following:

> Section 5.01. ... AND the Borrower hereby unconditionally and irrevocably authorizes the bank to pay the proceeds of the Facility (where applicable) directly to any such person as may be entitled thereto. All amounts so paid shall be deemed to

form part of the Facility made hereunder and the acknowledgement of receipt of such parties shall be deemed as if the same has been made or given by the Borrower personally.

[11] Since the commencement of the construction of the project, the appellant wrote progressively to the respondent to disburse the term loan 2 pursuant to the facility agreement. There were seven instances altogether as evidenced by the appellant's letters dated 28 August 2012 for RM2,293,388, 5 December 2012 for RM263,174 and RM1,552,871.25, 31 December 2012 for RM1,092,799.69, 30 January 2013 for RM2,472,877.28, 19 April 2013 for RM1,802,060.28, 29 May 2013 for RM2,730,549 respectively. These letters contained the express instruction of the appellant to remit payment to Fairon and accompanied by the progress payment certificates Nos 1 to 7 of Messrs Jurutera Nusantara Bersekutu Sdn Bhd and Kooi Keat Architect.

[12] Upon the completion of the project and in respect of progress payment certificate No 8, Farion consented to the remittance of RM901,216.38 to be made to Direct Express Logistics (M) Sdn Bhd, a subsidiary of the appellant for payment of materials and labour supplied to Fairon as well as for retention money pursuant to the building contract. This is evidenced by the letter of Fairon and the appellant to the respondent dated 12 December 2013 and 13 December 2013 respectively.

[13] However the respondent failed to comply with the instruction of the appellant. There was subsequently a meeting held between the appellant and the respondent on 20 May 2014 and it was agreed that the respondent would disburse RM932,175.63 and RM901,216.38 to Fairon and Direct Express Logistics (M) Sdn Bhd respectively in respect progress payment certificate No 8. This is evidenced by the appellant's letter to the respondent dated 21 May 2014.

[14] The respondent replied on 4 June 2014 confirming their refusal to comply with the appellant's instruction by reason of Fairon's withdrawal of its earlier consent for payment to Direct Express Logistics (M) Sdn Bhd and that Direct Express Logistics (M) Sdn Bhd isn't a party to the building contract or facility agreement. The withdrawal of Fairon's consent is supposedly evidenced by a letter dated 2 June 2014 addressed to the respondent.

[15] The respondent hence disbursed the entire amount of RM1,833,392.01 pursuant to progress payment certificate No 8 to Fairon on 6 June 2014 notwithstanding the appellant's letter of the same day expressly forbidding the respondent to do so.

[16] The appellant further replied to the respondent by letter dated 9 June 2014 disagreeing with the respondent's stance as expressed in its letter dated 4 June 2014. As far as the appellant is concerned, the respondent acted in breach of the appellant's instruction.

[17] Accordingly, the appellant filed the suit in the sessions court on 10 September 2014.

CONTENTIONS AND FINDINGS

[18] The appellant's contention is principally that it is entitled to bring the suit against the respondent for failure to act in accordance with mandate and instruction of the appellant in breach of banker-customer relationship under a loan contract.

[19] The respondent cross contended that the progress payment certificate No 8 clearly showed work was done by Fairon and the indebtedness of Fairon to a third party is irrelevant. Hence it was justified in the absence of a garnishment order by Direct Express Logistics (M) Sdn Bhd for the respondent to disburse the amount of RM1,833,392.01 pursuant to progress payment certificate No 8 directly to Fairon disregarding the appellant's instruction. As the result, the sessions court suit brought by the appellant is unmeritorious and bound to fail.

[20] This is a striking out application under O 18 r 19 of the Rules of Court 2012 that provides:

> 19 Striking out pleadings and endorsements (O 18 r 19)
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that–
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

[21] It is nevertheless trite law that the application should only be allowed in plain and obvious cases. In *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, Mohamed Dzaiddin SCJ (later CJ) held at p 43 as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. *It is only in plain and obvious cases that recourse should be had to the summary process under this rule* (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd 7*), *and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'* (see *AG of Duchy of Lancaster v L & NW Rly Co 8*). *It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence* (see *Wenlock v Moloney & Ors 9*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd 7*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (Emphasis added.)

Furthermore in the Court of Appeal case of *Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim* [2013] 4 MLJ 173, Anantham Kasinather JCA held as follows at p 182:

> [14] *In our judgment, the aforesaid principle of law pronounced by our Supreme Court in Bank Negara Malaysia v Mohd Ismail & Ors is not limited in its application to O 14 proceedings but extends to applications under O 18 r 19. We opine to this effect because both applications are summary in nature* ... In other words, according to the submission of counsel, it is unarguable that these obiter remarks once admitted are conclusive of the defence of justification to the respondent's claim based on slander and libel. (Emphasis added.)

[22] The appellant demonstrated that it has a sustainable cause of action against the respondent in law as seen from several cases of high authority.

[23] Firstly in the Federal Court case of *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; [2006] 3 AMR 629, PS Gill FCJ held as follows at p 13 (MLJ); p 645 (AMR):

> Further, a bank is supposed to treat the customer's mandate at its face value, save in extreme cases. A bank is not obliged to question any transaction which is in accordance with the customer's mandate, unless there are grounds for believing that these was a misuse of authority for the purpose of committing a fraud. See *Lipkin Gorman (a firm) v Karpnale Ltd & Anor* [1992] 4 AllER 409...

[24] Secondly also in the Federal Court case of *Ricky Thong Yew Fook & Anor v Arab Malaysian Bank Bhd* [2011] 4 MLJ 268; [2011] 1 AMR 325, Zulkefli Ahmad Makinuddin FCJ (now CJ (Malaya)) held as follows at p 280 (MLJ); p 335 (AMR):

> [21] The respondent bank therefore can only operate the said account in strict compliance with the second appellant company's mandate and the respondent bank was obliged to honour the second appellant company's withdrawal of funds in the account so long as there is a credit balance therein. On this point we would like to refer to the case of *Proven Development Sdn Bhd v Hongkong and Shanghai Banking Corp* [1998] 6 MLJ 150 wherein Arifin Zakaria J (as he then was) at p 157 had this to say:
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> It is also to be observed that banker is bound by contract to observe the mandate given by the customer and any breach of the mandate unless ratified by the customer would tantamount to a breach of that contract.

[25] Thirdly in the Court of Appeal case of *Public Bank Bhd & Anor v Exporaya Sdn Bhd* [2013] 1 MLJ 507; [2013] 1 AMR 191, Ramly Ali JCA (now FCJ) held as follows at p 518 (MLJ); pp 198–199 (AMR):

> [24] The contractual duties of a bank towards a customer was established by the English Court of Appeal in the case of *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 331 where Alliott J held the following propositions:
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> (1) The bank is entitled to treat the customer's mandate at its face value save in extreme cases;
>
> (2) The bank is not obliged to question any transaction which is in accordance with the mandate; unless a reasonable banker would have grounds for believing that the authorised signatories are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intention;
>
> (3) It follows that if a bank does not have reasonable grounds for believing that there is fraud, it must pay;
>
> (4) Mere suspicion or unease do not constitute reasonable grounds and are not enough to justify a bank in failing to act in accordance with a mandate; and
>
> (5) A bank is not required to act as an amateur detective.
>
> [25] It is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's order, mandate or direction. However that duty must be subordinate to the bank's other conflicting contractual duties particularly in cases where the bank received a valid and proper order or mandate which it is prima facie bound to execute promptly on pain of incurring liability for consequential less to the customer, when it is subsequently established that the order or mandate was an act of fraud or misappropriation of money by the director or officer of the customer. If the bank executes order knowing it to be dishonestly given, shutting its eyes to the obvious

fact of dishonesty or fraud, or acting recklessly in failing to make such inquiries as an honest and reasonable banker would make, the bank will plainly be liable (see decision of Steyn J in *Barclay Bank Plc*).

[26] On the facts herein, it is clear to me from section 5.01 of the facility agreement and cl 2.8 (c) of the letter of offer read together that there is no stipulated and prefixed person wherein the respondent must disburse the payment pursuant to term loan 2. The predominant purpose of the independent architect's certificate is in my view arguably for ascertaining the proper valuation of the work done rather than the designated person to be paid as seemingly contended by the respondent.

[27] Accordingly I observed that it is the appellant that mandated and instructed the respondent to disburse the loan for each and every progress payment since the commencement of the construction works of the project. In this respect the payee was Fairon for progress payment certificates Nos 1 to 7 as so directed. This is the established course of dealing between the parties and the respondent must be estopped from contending that there is neither the right nor the ability of the appellant to dictate the payee to the respondent. The authority for this proposition is in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 where Gopal Sri Ram JCA (later FCJ) held the following:

> *The fundamental principle is that stated by Lord Cairns LC, viz, that the representor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings which have thus taken place between the parties*. To establish such inequity, it is not necessary to show detriment; indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights. Take the facts of *Central London Property Trust Ltd v High Trees House Ltd.* [1946] 1 All ER 256; [1947] KB 130, the case in which Denning J breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist on his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a Court might well think it right to conclude that only after reasonable notice could the lessor return to charging rent at the higher rate specified in the lease.
>
> *Furthermore it would be open to the Court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice*. (Emphasis is added.)

[28] Be that as it may, it is also plain that Fairon has on 12 December 2013 consented in writing to payment of RM901,216.30 due in progress payment

certificate No 8 to be paid direct to Direct Express Logistics (M) Sdn Bhd. However this consent was purportedly withdrawn by Fairon unilaterally in its letter dated 2 June 2014 that was addressed to the respondent only. This crucial letter from Farion has not been exhibited in the affidavits of the respondent for the court's review.

[29] In the circumstances, it is my view that this is not a plain and obvious case to strike out the sessions court suit. As alluded to in the Court of Appeal case of *Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim*, the principles in an application for summary judgment apply to a striking out application too since they are both summary in nature. There are in my view certainly triable issues herein as to whether the appellant was mandated pursuant to the facility agreement and letter of offer to dictate the payee to the respondent and associated with that; whether the respondent was estopped from refusing to comply with the appellant's instructions to pay Direct Express Logistics (M) Sdn Bhd as the payee based on their past course of dealings. Moreover I am also of the view that the circumstances and hence the justification for the unilateral withdrawal of Fairon's consent needs investigation by way of trial. It is fatal to an application that is summary in nature when the crucial evidence of the unilateral withdrawal is not even before the court.

[30] It seems immaterial to me that the respondent has already paid that amount of RM901,216.30 to Fairon as that is not an excuse for having wrongly disbursed the loan amount in breach of mandate.

CONCLUSION

[31] In the Court of Appeal case of *Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd* [2006] 4 MLJ 271; [2006] 2 CLJ 1021, Zulkefli Ahmad Makinudin JCA (now CJ (Malaya)) said as follows at p 276 (MLJ); p 25 (CLJ):

> [12] We find it is most appropriate here to state the well established principle in that the power of striking out pleadings under O 18 r 19 of the RHC as invoked by the appellant in this case is too well-known that it can only be exercised when the respondent's claim on the face of it is obviously bound to fail.

[32] For the foregoing reasons, I am satisfied that the sessions court suit is on the face not obviously bound to fail. Consequently I allowed the appeal as so ordered.

Appeal allowed.

Reported by Afiq Mohamad